No. 08-1447

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

ST. JOHN'S UNITED CHURCH OF CHRIST, HELEN RUNGE, and SHIRLEY STEELE,
*Petitioners*,

v.

FEDERAL AVIATION ADMINISTRATION, LYNNE A. OSMUS, Acting Administrator of the Federal Aviation Administration, and CITY OF CHICAGO,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF FOR RESPONDENT CITY OF CHICAGO IN OPPOSITION

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## QUESTION PRESENTED

Whether the D.C. Circuit erred in finding that petitioners failed to carry their burden of establishing Article III redressability in this case.

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## BRIEF FOR RESPONDENT CITY OF CHICAGO IN OPPOSITION

### STATEMENT

This petition arises from the sixth federal judicial proceeding brought by these same petitioners in four years contesting actions by Chicago and the FAA to modernize O'Hare International Airport. This time petitioners complain about the FAA's administrative determination, under 49 U.S.C. § 40117(d), that Chicago adequately justified collecting passenger facility charges ("PFCs") to help fund airport expansion and modernization. The FAA approved the moderniza-

tion plan itself in September 2005; and the D.C. Circuit, in a different case, upheld that approval against petitioners' Religious Freedom Restoration Act ("RFRA") challenge. In this case, the court of appeals dismissed petitioners' RFRA challenge to the PFC decision, holding that petitioners failed to satisfy the redressability requirement of Article III standing.

**Background**

1. *O'Hare Modernization.* O'Hare Airport is "not only one of the busiest airports in the world"; it is also "one of the most congested." *St. John's United Church of Christ v. City of Chicago*, 502 F.3d 616, 634 (7th Cir. 2007), cert. denied, 128 S. Ct. 2431 (2008) ("*St. John's*"). For years, inefficiencies in O'Hare's outmoded airfield design—a triangle of intersecting runways—have limited the rate of takeoffs and landings, especially in bad weather. Travelers who use O'Hare are subject to delays "at least twice as bad as" those at any other major American airport. *Id.* These endemic problems—nearly 500 delayed flights per day in 2003 (at an average of 57 minutes each)—adversely affect the local and state economies; and because more than half of O'Hare's passengers connect to other destinations, these problems radiate across the nation. J.A. 2215.

In 2001, Chicago, which owns and operates ("O'Hare"), announced the O'Hare Modernization Program ("OMP"), a comprehensive plan to address the chronic and worsening capacity and delay problems. See *St. John's*, 502 F.3d at 620. The OMP reconfigures O'Hare's airfield layout to six parallel and two crosswind runways, enabling a constant stream of

landings and takeoffs. *Ibid.*[1] The redesign requires acquisition of 433 acres of land adjacent to O'Hare, including 539 private homes and 197 businesses. FAA Record of Decision ("ROD") 62.[2] Petitioner St. John's United Church of Christ owns St. Johannes, a religious cemetery that lies directly in the path of new Runway 10C/28C and must be relocated. ROD 97. See also App., *infra*, 1a. Chicago's original plan contemplated relocation of a second cemetery, Rest Haven, but it was later accommodated in a cargo area. ROD 96; see also App., *infra*, 1a. After extensive analysis, FAA experts concluded that no alternative design would accommodate St. Johannes without compromising the project. ROD 97-103. Chicago has committed to relocating graves at St. Johannes in accordance with established protocols. See *St. John's*, 502 F.3d at 642; ROD App. B.

The OMP's projected cost is $14.29 billion, which will come from private sources—General Airport Revenue Bond ("GARB") funds, direct private investment, and PFCs assessed on those traveling through O'Hare—as well as federal funds for airport improvement projects ("AIP"). See J.A. 1842, 1843.

2. *The FAA-Approved Layout Plan.* To construct the OMP, Chicago submitted an amended airport layout plan ("ALP") to the FAA in 2002. Petitioners objected that approving Chicago's ALP would violate RFRA, which requires strict scrutiny of federal government actions that "impose substantial burdens on religious exercise." 42 U.S.C. § 2000bb-1(b); see also Pub. L. No. 106-274, § 7(a)(1) (amending defini-

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[1] Other plan components include new taxiways, terminal facilities, and control towers.

[2] The ROD is available at http://ohare.com/rod/ORD_ROD_Final.pdf

tion of "government" to delete "a State, or a subdivision of a State"), codified as amended at 42 U.S.C. § 2000bb-2(1)). The FAA considered that objection in its comprehensive review of Chicago's submission, which also included review of compliance with air safety, environmental protection laws, and national transportation policies; Chicago's financing plan; and eligibility for federal grants and PFC-collection authority. See 49 U.S.C. § 47106(c)(1); ROD 106-07.

In 2005, the FAA issued a 492-page ROD, which, among other things, approved Chicago's ALP. With respect to St. Johannes, the FAA, after examining multiple alternatives (eight proposed by petitioners and five the agency developed itself), determined none was acceptable, and further concluded Chicago's plan would pass muster even under strict scrutiny. See ROD 97-102.[3]

The D.C. Circuit upheld the ROD against petitioners' RFRA challenge. *Village of Bensenville v. FAA*, 457 F.3d 52 (D.C. Cir. 2006) ("*Bensenville*"); Pet. App. 15a. The court recognized that this Court had ruled in *City of Boerne v. Flores*, 521 U.S. 507 (1997), that RFRA could not be applied to burdens on religious exercise resulting from state and local government action, and that Congress had responded to that decision by amending RFRA to exempt these governments from the statute. Pet. App. 22a-23a & n.1. Thus, RFRA scrutiny would be indicated only if the "'specific conduct'" to which petitioners objected—the

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[3] The FAA expressed doubt whether RFRA required strict scrutiny of Chicago's plan, noting the agency "did not design the OMP" and could not "compel the City to implement some or all of it," but assumed "without deciding or agreeing" that the statute applied—in the hope that doing so would spare the "vital project * * * the uncertainties of litigation." J.A. 2086, 2087.

"seizure and relocation of St. Johannes Cemetery"—was "fairly attributable" to the federal government. *Id.* at 31a (quoting *American Manufacturers Mutual Insurance Co. v. Sullivan*, 526 U.S. 42, 51 (1999); *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)).[4]

The court noted that under this Court's decisions, a regulator's approval or "'failure to overturn'" a non-government actor's practice does not "transmute" the conduct into government action. Pet. App. 36a (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 358-59 (1974)). Neither does receipt of public funds, "even 'virtually all'" of the entity's funding. *Id.* at 31a (citing *Rendell-Baker v. Kohn*, 457 U.S. 830, 840-41 (1982); *Blum*, 457 U.S. at 1011). Accordingly, the court held that "the FAA's peripheral role in the City's relocation of St. Johannes is not sufficient to hold the agency responsible for purposes of RFRA," explaining:

> The City—not the FAA—is the cause of any burden on religious exercise because of its role as inventor, organizer, patron, and builder of the O'Hare expansion. The City designed the ALP with its attendant impact on the cemeteries. * * * The City intends to provide all of the funding through other sources if the federal funds are not forthcoming. And at the end of the day, the City will carry out the seizure and physical relocation of St. Johannes Cemetery.

*Id.* at 33a.

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[4] The court further observed that triggering RFRA based on administrative approval of state or local government actions would exact the same costs as those that caused this Court to hold RFRA unconstitutional as applied to these governments and would ignore Congress's post-*Boerne* revision of the statute. Pet. App. 39a.

No judge of the D.C. Circuit, not even the dissenter from the panel opinion, called for a vote on petitioners' request for *en banc* rehearing, and petitioners did not seek certiorari. Chicago has since made substantial progress on the OMP. Extended Runway 10L/28R, new Runway 9L/27R, and a new control tower all opened in 2008; more than $500 million has been spent on Runway 10C/28C; and all but 35 properties needed for the OMP have been acquired. Chicago's application for approximately $182 million for design of the completion phase of the OMP was approved in February 2009. Moreover, on-time performance at O'Hare is improving: in the ranking of 31 major airports, O'Hare rose seven places for arrivals and six places for departures for the first five months of 2009, as compared to the same period of 2008. See <http://www.bts.gov/programs/airline_information/airline_ontime_tables/2009_05/index.html>. O'Hare's capacity also increases; according to the FAA's projections, even just the one new north runway accommodates more than 50,000 additional annual operations. J.A. 7690.

*Bensenville* also dismissed, for lack of finality and Article III standing, a separate petition for review of a 2005 Letter of Intent ("LOI") announcing the FAA's intention to make available $337.2 million in AIP grants over the next 15 years. The court found no redressability because petitioners failed to show that "'the practical consequence of [vacating the LOI] would amount to a significant increase in the likelihood that [the petitioners] would obtain relief that directly redresses the injury suffered.'" Pet. App. 43a (quoting *Utah v. Evans*, 536 U.S. 452, 464 (2002)). Instead, Chicago would "develop O'Hare as planned

without the $337 million in federal funding set forth in the LOI." Id. at 43a-44a.[5]

3. *Petitioners' Challenges to FAA's Federal Funding Decisions.* In two cases after *Bensenville*, petitioners again asked the D.C. Circuit to set aside under RFRA FAA decisions relating to federal funding for the OMP.[6] In those cases, Chicago and FAA argued, among other things, that such claims are foreclosed by settled law, including *Bensenville*, that government funding does not provide a basis to hold the federal government responsible for the conduct of a nonfederal actor and that, with respect to the specific conduct at issue, Chicago, not the FAA, is the cause of any burden on religious exercise. In both cases, the court did not reach these grounds, instead ruling on the threshold argument that petitioners had failed to make the constitutionally mandated showing of standing necessary to subject-matter jurisdiction.

In *St. John's United Church of Christ v. FAA*, 520 F.3d 460 (D.C. Cir. 2008), Pet. App. 62a, which involved a $29.3 million AIP grant, the court dismissed

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[5] Petitioners characterize *Bensenville*'s unanimous ruling that they lacked Article III standing as "dictum" (Pet. 13), but it is an alternative holding. Later decisions by the same court, addressing other claims by petitioners, recognize it as such. See *St. John's United Church of Christ v. FAA*, 520 F.3d 460, 461-62, 463 (D.C. Cir. 2008); Pet. App. 63a-64a, 67a. In general, "alternative holdings are binding precedent, not dicta." *Carachuri-Rosendo v. Holder*, 570 F.3d 263, 266 (5th Cir. 2009).

[6] Petitioners filed other religion claims against Chicago in state court and in *St. John's* and have asserted religion-based objections to eminent domain in *City of Chicago v. St. John's Evangelical Church of Addison Township*, No. 07 ED 59 (Circuit Court of the Eighteenth Judicial Circuit, DuPage County, Illinois).

the petition for review based on deficiencies of causation and redressability. The court questioned how the challenged agency action, which granted money for OMP "work that did not affect the petitioners," could injure them (Pet. App. 65a), and rejected petitioners' attempt to show causation by a clause in the grant agreement that supposedly "'compel[led] Chicago to complete [the OMP] (necessarily destroying St. Johannes . . .),'" *id.* at 66a (citation omitted). After explaining that the boilerplate grant provision had no such effect, the court continued:

> Nor does Chicago need any compelling. Chicago designed the plan for the project; it submitted that plan to the FAA and fought for its approval. *Vill. of Bensenville*, 457 F.3d at 65. Chicago will provide most of the funding and is prepared to obtain funding from other sources if federal money is unavailable. *Id.* So even if the FAA could compel Chicago to complete the project, vacating the grant condition would not redress the petitioners' injuries because Chicago is committed to completing the project anyway.

*Id.* at 67a. The primary obstacle to redressability, the court continued, was not uncertainty whether the FAA would reaffirm its funding decision after redoing the RFRA analysis, but "uncertainty over what Chicago would do," because it was "'entirely conjectural whether the nonagency activity that affects [petitioners] will be altered or affected by the agency activity they seek to' overturn." *Id.* at 68a (emphasis in original) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571 (1992) (plurality opinion)). Petitioners did not seek certiorari.

In *St. John's United Church of Christ v. FAA*, No. 07-1435 (D.C. Cir. July 14, 2008) (per curiam), App.,

*infra*, 2a, the court dismissed for lack of causation and redressability a petition for review of the second AIP grant, this time for $28.4 million. Petitioners did not seek certiorari.

**Proceedings Below**

In this case, what is before the Court is the FAA's 2007 approval of Chicago's applications to collect $1.2 billion in PFCs for the OMP. Pet. App. 7a. "PFCs are non-federal funds." *Id.* at 5a. Unlike AIP grants, which come from the Treasury and are appropriated by Congress, PFCs are collected from ticket purchasers by the airlines, which hold them in trust for airport operators (49 U.S.C. § 40117(m)), and spent locally in connection with "specific" airport improvement projects that meet statutory eligibility requirements (*id.* § 40117(a)(3)). The FAA found that Chicago's applications "adequately justified" the assessment of PFCs for four "specific project[s]": three runways and land acquisition "for runway construction, overflight protection, and other projects related to the building of runways." Pet. App. 6a. Projects related to Runway 10C/28C totaled $693.3 million ($346.6 million in bond capital and an equal amount for financing and interest). J.A. 9560. None of the PFC collections would be spent to acquire or relocate the cemetery. J.A. 9547.

The D.C. Circuit dismissed petitioners' RFRA challenge for lack of standing, holding that "petitioners [failed] to show a substantial probability that in the absence of PFCs Chicago would leave the cemetery alone." Pet. App. 2a.[7] After assuming arguendo

[7] The court also denied the petition on the administrative review claims, holding that the FAA's findings of "adequate

that the Church could establish two of the three prerequisites of standing—injury-in-fact and causation—the court found the claimed redressability "exceptionally speculative." *Id.* at 3a. Chicago had "convincingly disputed" petitioners' assertion that, in the event of a ruling in their favor (and a favorable decision by the FAA on remand), the City would "lack[] alternative sources of funds to replace the PFCs." *Id.* Petitioners' requests for rehearing and rehearing *en banc* were denied.

## REASONS FOR DENYING THE WRIT

Petitioners challenge the D.C. Circuit's application of a single prong of this Court's test for Article III standing to the facts of this case. The petition does not present any question warranting this Court's review.

1. Petitioners do not claim any conflict between the decision below and any other by a court of appeals about the legal rules governing Article III redressability. Instead, they ask the Court to review the correctness of the court of appeals' application of those settled rules in this case, namely, its finding that petitioners failed to establish a "substantial probability" or "significant increase in the likelihood" that Chicago would abandon its complex, carefully designed, and FAA-approved airport project if the PFC decision were reversed.

2. Petitioners do claim the court below failed to follow *Utah v. Evans*, 536 U.S. 452 (2002), and *Franklin v. Massachusetts*, 505 U.S. 788 (1992), but the opinion is entirely consistent with these cases and actually cited *Evans*. Petitioners misread the

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justification" were neither arbitrary nor capricious. Pet. App. 7a-11a. Petitioners do not seek review on these issues.

decision below and this Court's redressability jurisprudence in arguing for a presumption that, they contend, the court of appeals failed to apply.

3. In any event, there is no merit to petitioners' claim that the court below erred in applying the law to the facts presented; nor would the result be different if petitioners were able to overcome the lack of redressability. Petitioners' central assignment of error is that the court gave insufficient weight to Chicago's actions with respect to Rest Haven Cemetery. But for numerous obvious reasons, Chicago's willingness, during the ALP-approval process, to modify the cargo area is no basis to infer it would be amenable to a wholesale redesign of the airfield reconfiguration at the heart of its modernization program years after construction has begun.

Petitioners also wrongly claim that the court below should have assessed redressability on the assumption that Chicago would likely alter its ALP if the FAA required a change before providing federal funding or approving user fees. This ignores a very serious question whether the FAA could condition its decisions on Chicago's abandonment of what has already been determined, in a prior review proceeding brought by these same petitioners, to be a lawful airport construction project. It also ignores that petitioners cannot claim injury from any aspect of the ALP except Runway 10C/28C, and that yet another prior review proceeding by these same petitioners has settled that petitioners lack standing to challenge an amount of money similar to the PFCs for the capital costs of that runway.[8] As for funding or PFCs

[8] The FAA approved a total of $693.3 million in PFCs for Runway 10C/28C. This amount included $346.6 million in capital costs and an equal amount authorized for financing

approved in other decisions or not yet approved at all, these also were obviously not within the court's jurisdiction. Because the PFCs actually at issue here are insufficient to alter Chicago's course, they are insufficient to confer standing. In fact, this lack of redressability is not the only Article III defect here. Petitioners also failed to show that the injury they complain of—the relocation of St. Johannes—is fairly attributable to the FAA. That issue was also settled in prior litigation and cannot be challenged here.

Moreover, while petitioners' standing is the Court's first concern, it is almost the least of their problems. Waiting just on the other side of the jurisdictional threshold in this case is a welter of defects dispositive of the merits of petitioners' claims. Had petitioners not been dismissed on standing grounds, they would have confronted circuit precedent—set in a prior case they brought—under which their RFRA challenge to the FAA's approval of PFC authority would necessarily fail. Moreover, this prior decision demonstrates both that petitioners have not been denied substantive consideration of their RFRA claim and that their claim in this case was doomed by preclusion problems of their own making. Thus, even if the decision below had rested on a hotly controverted understanding of redressability, rather than the universally accepted one, this case would still be an inappropriate vehicle for resolving the issue.

4. Petitioners seek to put these earlier decisions to entirely different and improper use, urging that the importance of the Article III decision below should be

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costs. Because the financing costs would not be incurred if petitioners were successful in overturning the Runway 10C/28C PFCs, the net loss to Chicago is $346.6 million in project funding. The entire LOI was $337 million.

gauged "in context" of the prior decisions, which petitioners contend were erroneous in broadly significant ways. But the D.C. Circuit's RFRA ruling is not before the Court in this case. If that court has adopted an unusually and significantly restrictive construction of the statute (which it has not), this Court can take up the issue in a case in which it is actually and timely presented, which it is not here.

## I. THE NARROW AND CASE-SPECIFIC QUESTION PRESENTED DOES NOT WARRANT FURTHER REVIEW.

Notwithstanding petitioners' invocation of "the immediate context of a prior related decision" (Pet. 5), that decision became final without a request for review in this Court. This separate case raises a single question: whether the court of appeals erred in holding that petitioners failed to show the redressability necessary for the court to entertain their claim that the FAA's PFC approval violated RFRA. That question is not certworthy.

### A. Petitioners Complain Only About The Application Of Settled Law To This Case.

Petitioners do not dispute that the burden of demonstrating redressability is on the party invoking federal jurisdiction. See *Defenders of Wildlife*, 504 U.S. at 561. Nor do they dispute that under this Court's cases, redressability is lacking unless "the practical consequence" of the decision sought from the court "would amount to a significant increase in the likelihood" of "relief that directly redresses the injury suffered." *Evans*, 536 U.S. at 464; see Pet. App. 4a, 43a. Rather, petitioners ask the Court to overturn the D.C. Circuit's application of this settled

Article III standard to the facts of this case. Petitioners do not claim that the D.C. Circuit had the power in this case to order Chicago to cease or radically alter the complex airport reconfiguration project it began designing and building the better part of a decade ago, and indeed that design has already been upheld. See Pet. App. 19a-40a. All that is before the Court here is the finding that there is no "substantial probability" Chicago would relocate Runway 10C/28C, even if PFCs were withheld because of its current location. Pet. App. 2a. This is no basis for certiorari. This Court generally does not entertain claims of case-specific error, let alone sift through and re-weigh evidence to do so.

### B. There Is No Conflict Between The Redressability Determination Below And This Court's Decisions.

Review is also not warranted to settle any "conflict" between the redressability holding and "this Court's precedent." Pet. 21. The only cases petitioners actually cite are *Evans* and *Franklin*, which found redressability in cases involving the federal census, despite the non-party status of officials whose actions would ultimately be required to provide plaintiffs relief. But the claim that the D.C. Circuit has "drifted" away from these cases (*ibid.*) is incorrect. Far from abandoning those decisions and denying standing in cases where plaintiff has shown it is "likely that the non-party actor will modify its behavior" (*id.* at 16), the D.C. Circuit continues to treat *Evans* as controlling, as petitioners elsewhere acknowledge. See *id.* at 18 (observing that the D.C. Circuit applied *Evans* in *National Parks v. Manson*, 414 F.3d 1, 6-7 (D.C. Cir. 2005)). And worse still for their claim, the court below invoked the very test—

whether there is a "'significant increase in the likelihood'" of a favorable response—of the very opinion petitioners hold out as announcing the proper standard. Pet. App. 4a (quoting *Bensenville*, Pet. App. 43a; *Evans*, 536 U.S. at 464).

Beyond that, petitioners misread this Court's precedent to claim a conflict. *Evans* and *Franklin* did not, as petitioners claim, direct federal courts to apply a "presumption" (Pet. 18) that non-party actors will modify their behavior to avoid injury to the plaintiff. Indeed, this Court's cases, both before and after these decisions, employ essentially the opposite rule. "We presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (internal quotation marks omitted). Similarly, the Court requires the party seeking to invoke federal jurisdiction to bear the burden with respect to each element of Article III standing (see *Defenders of Wildlife*, 504 U.S. at 561, 567 n.3); and redressability is "substantially more difficult" to show (*Allen v. Wright*, 468 U.S. 737, 758 (1984)) in cases like this one—where "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*," and redress "'depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict.'" *Defenders of Wildlife*, 504 U.S. at 562 (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989) (opinion of Kennedy, J.) (emphasis in original)). See also *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976).

Petitioners' contention that *Evans* and *Franklin* required the court below to take as "given" the "strong likelihood that Chicago would comply with any decision by FAA (or by the Court of Appeals) that the Petitioners were entitled to substantive protection under RFRA" (Pet. 5) ignores the fundamental differences between the legal claims—and redressability issues—in those cases and this one. The plurality in *Franklin* found it "substantially likely that the President and other executive and congressional officials would abide by an authoritative interpretation" of statutory and constitutional provisions that actually govern their actions, even though these officials "would not be directly bound by such a determination." 505 U.S. at 803. Indeed, in finding redressability, the Court expressly noted the conspicuous absence of any indication from the Solicitor General (on behalf of the non-party executive officials) that they would stand on their procedural rights, ignore a declaratory judgment, and insist on an injunctive order. See *Evans*, 536 U.S. at 460; *Franklin*, 505 U.S. at 803 (plurality opinion). Moreover, the plaintiffs in *Evans* and *Franklin* had a "substantive" right under the Census Clause's "actual Enumeration" requirement (U.S. Const. art. I, cl. 2 § 3) to be free from the methods alleged (and found) to be unconstitutional, whether or not the federal officials were technically bound by the judgment.

Here, by contrast, petitioners presented a claim under a statute that does not govern Chicago's actions. This Court itself, in *Boerne*, settled that RFRA cannot constitutionally be applied to state and local governments; and for all petitioners' loose references to RFRA compliance and evasion (*e.g.*, Pet. i, 4, 5, 6, 17, 18, 19, 20, 27), even they do not claim that local government action unintentionally burdening

religious exercise violates that statute. And of course it does not. See *Boerne*, 521 U.S. at 534-36; 42 U.S.C. § 2000bb-2(1). Moreover, as we explain, the court in the prior *Bensenville* decision rejected petitioners' claim that Chicago's plan to relocate St. Johannes is unlawful under RFRA. Petitioners' reliance on the courts' reluctance to allow a defendant to "evade an adverse decision" (Pet. 19) ignores that no interpretation of RFRA can give them any substantive rights against Chicago. Moreover, the D.C. Circuit has repeatedly found that Chicago can and would implement the OMP without either federal funds or PFC approval. Pet. App. 3a-4a, 33a, 67a; App., *infra*, 2a. Chicago's ability and intent to go its own way if necessary makes this case like *Defenders of Wildlife*, not *Evans* and *Franklin*. In *Defenders of Wildlife*, the redressability holding reflected the Solicitor General's position that the regulations at issue were not binding on the non-party funding agencies. See 504 U.S. at 568-70 & n.4.

If anything, *Evans* supports the decision below. While *Evans* ultimately found standing because of likely non-party compliance with a federal court's decision, the Court first considered whether, as one respondent had claimed, the relief petitioners sought was statutorily impermissible. See 536 U.S. at 461-64; see also *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107-08 (1999) (request under statute for relief that would redress plaintiff's injuries does not support standing if statute does not provide for relief sought). Here, as we explain more fully below, the D.C. Circuit's settled, authoritative construction of both Article III and RFRA would prohibit the court from awarding the kind of sweeping relief needed before petitioners could make the required showing of redressability.

### C. Petitioners' Objections To The Decision Below Are Groundless In Any Event.

The shortcomings petitioners purport to have identified in the D.C. Circuit's application of the redressability test are not errors at all. To begin, the decision did not hold that "no amount of federal funding * * * can meet the Article III standing requirement, as long as the non-federal party invokes a fiction that it can raise the money anyway." Pet. 23. See also *id.* at 6 (claiming the court of appeals evaded RFRA's "substantive protection against religious harm caused by federally funded projects"). This case involves only PFCs, which are non-federal funds.[9] Moreover, the court relied on evidence, not an assertion (see *id.* at 16) or a "fiction" (*id.* at 23) that Chicago can and would pursue the OMP without PFCs. There is nothing remotely unusual about that conception of redressability. See *Defenders of Wildlife*, 504 U.S. at 571 (plurality opinion) ("Respondents have produced nothing to indicate that the projects they have named will * * * be suspended" if federal funding were eliminated); *Simon*, 426 U.S. at 40-41. And besides all that, the RFRA statute on which petitioners rely is not a funding statute in any event.

Petitioners repeatedly insist that the court of appeals would have found redressability here less "exceptionally speculative" (Pet. App 3a) if it had paid more attention to Chicago's "prior conduct [regard-

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[9] Although the petition uses terms such as "federally authorized financial assistance" (*e.g.*, Pet. 3) and "federally authorized funds" (*e.g.*, *id.* at 6, 18), no doubt intending to blur the distinction between PFCs and federal grants, the D.C. Circuit correctly described PFCs as "non-federal funds." Pet. App. 5a.

ing] * * * Rest Haven Cemetery" (Pet. 17). According to petitioners, because Chicago "had already complied with the FAA's directive to preserve Rest Haven Cemetery," there was "substantial uncontroverted evidence that Chicago would abide by any order entered by FAA relating to RFRA protection of St. Johannes." *Id.* at 15. Petitioners' conception of the FAA's authority is legally erroneous and factually unsupported.

As a legal matter, the FAA is not empowered to issue "directives" aimed at securing "RFRA compliance" (Pet. 17) by local airport operators. Local governments are not required to comply with RFRA. Moreover, RFRA compliance by Chicago has never been petitioners' claim. Weak as it is, the gravamen of the review petition here was that *the FAA* became responsible for the claimed burden on petitioners' religious exercise by approving Chicago's PFC application because some of those user fees would be used to finance work the FAA had approved, and the D.C. Circuit upheld, years earlier in the ROD.

On the facts, the premise that Chicago would respond to an FAA decision refusing to approve PFCs for Runway 10C/28C by providing "identical RFRA protection" to St. Johannes as was provided to Rest Haven (Pet. 11) is fanciful. Rest Haven is in a far less crucial location, and Chicago voluntarily accommodated it by altering the intended placement of a cargo facility and fencing a public road. ROD 96-97. By contrast, St. Johannes sits in the direct path of an integrally important runway. See App., *infra*, 1a. Avoiding relocation would require significant alteration of the airfield; and the FAA found in the ROD that engineering, air safety, and environmental issues precluded any such alteration consistent with

OMP's capacity-enhancement and delay-reduction goals. See ROD 97-103. Moreover, Chicago's readiness to make an accommodation in the earlier circumstance, while vigorously contesting this one, is direct evidence that it does not see the two situations as remotely comparable and therefore cannot be presumed to respond to them the same way. Nor, of course, does the FAA see any comparison. The agency found relocation of St. Johannes so crucial to the ALP that it met even a strict scrutiny standard. See ROD 103.[10] And since then, the D.C. Circuit has settled that strict scrutiny is not even required. See Pet. App. 21a-40a.

Nor do petitioners advance any basis for assuming Chicago's decision on Rest Haven reflects a general policy of accepting whatever the FAA might think necessary for RFRA compliance, rather than simply a judgment that in that instance, the benefits of standing on its rights (and waiting for the judicial vindication that came in *Bensenville*) were outweighed by the costs.[11]

Likewise, there is no merit to petitioners' contention that the court below took an impermissible "all-or-nothing" approach (Pet. 18, 20) to redressability. Seizing upon the opinion's use of the word "scuttled," petitioners spin out a claim that the D.C. Circuit required them to show that Chicago would abandon

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[10] Petitioners' complaints about computer modeling (Pet. 10 n.2) were fully considered in *Bensenville* (Pet. App. 19a-20a). No further modeling was necessary for the PFC decision authorizing collection of user fees to fund projects approved in the ROD.

[11] Petitioners' contention that the FAA "directed Chicago to modify its plan to preserve Rest Haven" (Pet. 10) is not supported by their citation (Pet. App. 21a).

the entire OMP if the PFC decision were overturned, when it should have "assume[d] that Chicago would accept some level of adjustment of its plan" rather than lose billions in PFCs and future federal funding (*id.* at 20). This assumes that the court below was persuaded petitioners had shown Chicago was substantially likely to alter the location of Runway 10C/28C in the event of a favorable decision, and ruled against them because they failed to make a further showing that Chicago would abandon the entire OMP. This assumption is unfounded. As the opinion makes clear, the court below was keenly aware that petitioners' objections were confined to the "[c]onstruction of one of the runways," namely the one that "requires relocation of the St. Johannes religious cemetery." Pet. App. 2a. Indeed, a prior panel had held that petitioners could not challenge funding for other runways precisely because that "work . . . did not affect the[m]." *Id.* at 65a; see also App., *infra*, 2a. And, far from requiring an extravagant showing of redressability, the court dismissed the petition because petitioners failed to show the constitutionally required "substantial probability" that "Chicago would leave the cemetery alone" if petitioners' challenge were successful. *Id.* at 2a.

In fact, petitioners' real complaint is that the court of appeals did not take a sufficiently "all or nothing" approach—*i.e.*, that it was required to assume that a favorable decision in this case would have induced the FAA to "condition" approval of all the PFCs at stake in this case—indeed all future federal funding of the OMP—on Chicago's "compliance" with RFRA. See Pet. 17 ("FAA could condition the approval of the present $1.282 billion in PFCs on RFRA compliance"); *id.* at 18 ("FAA held the keys to billions of dollars in federally authorized funds"), 20, 21, 23.

But that was no error. As we explain above, the D.C. Circuit had previously settled that petitioners could challenge—and a federal court could set aside—only FAA decisions involving work that "affect[ed] petitioners." Pet. App. 65a. This eliminates three of the four PFC projects at issue here. And petitioners have not explained how future grants or PFCs—not yet even awarded—are both before the court in this case and for work that affects them.

Nor was the D.C. Circuit permitted, let alone required, to presume that the FAA would decide on its own to rescind approval of these other PFC projects, and suspend all future federal funding for O'Hare, until Chicago overhauled the already approved and judicially sustained airfield redesign. On the contrary, the FAA had concluded, in a final decision, that the PFCs applications were "adequate[ly] justif[ied]" (Pet. App. 6a), and petitioners do not explain how the FAA would have authority to rescind that approval. Nor could the FAA lawfully condition future funding decisions on Chicago's alteration of the project to satisfy petitioners' RFRA objections. As the D.C. Circuit held in *Bensenville*, federal funding, including "virtually all of an entity's funding" does not trigger strict RFRA scrutiny, when, as it held here, the "specific conduct" objected to is attributable to the non-federal actor. Pet. App. 31a (internal quotation marks omitted). And, as we also explain above, in addition to the usual prohibition on establishing redressability through speculation, *Evans* and *Steel Co.* make clear that it is impermissible to support such claims by hypothesizing relief that is unavailable as a matter of law.

At bottom, to the extent petitioners' claims have even superficial plausibility, it is because they ignore

what both controlling D.C. Circuit precedent and the plain text of RFRA, as amended, make clear: that the statute simply does not attempt to regulate, directly or indirectly through federal funding decisions, the actions of states and local governments.

### D. Reversal Would Not Enable Petitioners To Prevail.

If petitioners had shown redressability, the review petition would have been dismissed for failure to satisfy Article III's causation requirement. The D.C. Circuit had already held (on the merits, as we explain below) that "[t]he City—not the FAA—is the cause of any burden on religious exercise" (Pet. App. 33a), and it had held, in another, separate case, that petitioners' claims of FAA power to "compel" construction were (in addition to untrue) beside the point, because "Chicago [does not] need any compelling. Chicago designed the plan for the project; it submitted that plan to the FAA and fought for its approval." *Id.* at 67a. But even as a matter of first impression, putting these prior binding decisions to the side, petitioners cannot show that the FAA's 2007 approval of Chicago's PFC applications was the cause of Chicago's decision to design the 2001 ALP to relocate St. Johannes.

Causation requires a finding that "[t]he specific conduct" challenged is "fairly attributable" to the defendant. Pet. App. 31a. Thus, in this case, petitioners must show that relocation of St. Johannes was caused by or fairly traceable to the FAA's determination that the City had shown adequate justification to collect funds to implement certain OMP projects. Such a theory stretches well-settled Article III principles (and ordinary English) beyond the breaking point.

And if petitioners could clear the jurisdictional threshold, they would face swift and certain demise on the merits again. Contrary to petitioners' repeated complaint that they have never been afforded substantive review of RFRA compliance (see Pet. 4, 11 & n.3, 24), the D.C. Circuit, in *Bensenville*, rejected their RFRA claim on the merits. As the court explained, under settled law, neither federal "approval of or acquiescence in the initiatives of a [non-federal] party" nor "receipt of public funds, even of 'virtually all' of an entity's funding, is * * * sufficient to fairly attribute the entity's actions to the [federal] government," and thereby trigger RFRA. Pet. App. 31a (quoting *Rendell-Baker*, 457 U.S. at 840-41, and *Blum*, 457 U.S. at 1011).[12] The court also explained that the text and structure of the post-*Boerne* amendments foreclose any claim that Congress intended RFRA to reach cases like this one. See *id.* at 26a-40a. To that can be added the problem that petitioners' attempt to use RFRA to implicitly impose religious-accommodation obligations on state and local governments that receive federal funds

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[12] Petitioners contend that *Bensenville* "left undecided whether billions of dollars in federally authorized *funding* of a project executed by non-federal actors" was sufficient to "implicate RFRA." Pet. 6. (emphasis in original). That is accurate only in the sense that the prior case did not involve billions of dollars. Nevertheless, the court rejected both federal approval and federal funding as a basis for federal accountability, and that holding is broad enough to cover this case. "[T]he principle of *stare decisis* directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law." *Seminole Tribe v. Florida*, 517 U.S. 44, 67 (1996) (citation omitted). Moreover, this case does not involve billions of dollars either. As we explain, petitioners can claim injury only from the $346.6 million PFCs destined for Runway 10C/28C.

contravenes settled law that conditions on federal spending must be explicit. See *South Dakota v. Dole*, 483 U.S. 203, 207 (1987); see also Pet. App. 29a, 39a. *Bensenville* was a decision on the merits of petitioners' RFRA claim, namely that they have no such claim because the burden they complain about was caused by Chicago, not the FAA. Having settled that federal approval and federal funding are insufficient to impose federal responsibility for the project, the D.C. Circuit could not plausibly rule differently for federal authorization to collect private funds for a project not fairly attributable to the federal government.

And even this catalogue of problems merely scratches the surface of the reasons petitioners have no hope of prevailing on a RFRA claim, even leaving standing aside. While petitioners boldly proclaim "no dispute that the contemplated destruction of St. Johannes will substantially burden religious exercise" (Pet. 23), that is not remotely undisputed. No court has ever agreed with petitioners, and Chicago has highlighted petitioners' misconception of RFRA at every turn. See Pet. App. 24a n.2 (noting this unresolved issue); *St. John's*, 502 F.3d at 619 n.1 (same). Although we have not questioned the sincerity of petitioners' religious objection to cemetery relocation, it states no burden on the exercise of religion. Petitioners' complaint here is that they hold "a central belief" that "disturbing graves * * * would be a sacrilege." Pet. 9. But there is a difference, as this Court has recognized, between government action that is an affront to religious belief and action that imposes a substantial burden on religious exercise. A burden on beliefs—no matter how sincerely or strongly felt—is not a burden on the exercise of religion. See, *e.g.*, *Lyng v. Northwest Indian Cemetery*

*Protective Association*, 485 U.S. 439, 452-53 (1988); *Bowen v. Roy*, 476 U.S. 693, 697 n.3, 699 (1986); *Thomas v. Review Board*, 450 U.S. 707, 718 (1981). Indeed, "government simply could not operate if it were required to satisfy every citizen's religious needs and desires." *Lyng*, 485 U.S. at 452.

Finally, even in terms of what petitioners seem to mean by "substantive review of their * * * RFRA claim" (Pet. 11 n.3), their claim that the dissenting opinion in *Bensenville* was the only one to reach the merits of strict scrutiny review is simply false. The Seventh Circuit concluded (arguably in dictum) that Chicago's actions would withstand strict scrutiny. See 502 F.3d at 634-36. The FAA itself did as well. ROD 103-04. In fact, the great irony of the FAA's decision is that it applied RFRA in an excess of caution, so that this vital project would not be bogged down in litigation. See J.A. 2087. At a minimum, one would expect litigants relying so heavily on the FAA's determination that cemetery relocation for the ALP imposes a cognizable burden on religion (see Pet. 23) to acknowledge the FAA's further conclusion that the ALP nonetheless satisfies strict scrutiny, because it is the least restrictive means of furthering the compelling interests of capacity-enhancement and delay-reduction. Given that this further conclusion reflects the FAA's particular expertise in reviewing ALPs for their fit with the needs of the national aviation system, as well as engineering and air safety requirements, this omission is all the more troubling. And of course the ROD is final now, and has been for years.

* * * *

In applying this Court's redressability test to the particular case before it, the D.C. Circuit

discharged—and did not "excuse[] itself from"—its "constitutional obligation" (Pet. 24). "'No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (quoting *Simon*, 426 U.S. at 37). The court below correctly applied those principles, ruling that the possibility petitioners would actually obtain relief in the event of a ruling against the FAA in this case was "exceedingly speculative," rather than highly likely. That decision is correct and does not merit further review. Moreover, in seeking review, petitioners do not address a host of other defects—that they failed to show causation and thus lack standing for this reason as well, and that their RFRA claim fails on the merits because RFRA does not apply to Chicago's plan, and the relocation of the cemetery does not impose a substantial burden on petitioners' exercise of religion.

## II. THIS CASE PRESENTS NO ISSUE OF SIGNIFICANCE IN OTHER CONTEXTS.

To counter the (accurate) impression that the petition seeks merely to correct a single case-specific conclusion, petitioners make various claims that the decision below is sweepingly significant, asserting, among other things, that it conflicts with standing law in environmental cases involving federal permitting or funding. See Pet. 24. They also contend that it is a "dangerous new precedent" (*id.* at 7) and that, in combination with *Bensenville*, it has "eviscerated" RFRA (*id.* at 22). But petitioners offer no substantiation for these bold assertions. They do not cite a single environmental case, from any court, that might come out differently as a result of the decision here.

Similarly, if the D.C. Circuit had taken a uniquely restrictive view of Article III standing in RFRA cases, surely it would not be difficult for petitioners to find at least one decision from one of the other twelve courts of appeals that applied a different rule in a RFRA case sometime in the three years since *Bensensville*, if not before. In fact, the D.C. Circuit itself recognized in *Bensenville* that had "events played out differently, with the FAA ordering the change responsible for the burden or playing some greater role in the design of the ALP, perhaps there might be a valid claim under RFRA." Pet. App. 34a. That fact-specific ruling, as well, shows no issue of overarching significance meriting review even in that long-final decision.

Nor do petitioners substantiate their claim that the D.C. Circuit has used different tests for RFRA standing and environmental standing. Federal courts have long required plaintiffs suing under environmental statutes, as under other statutes, to satisfy the three-pronged constitutional test for standing, and have not hesitated to find standing lacking when that test was not satisfied. See *Summers v. Earth Island Institute*, 129 S. Ct. 1142, 1148-49 (2009); *Defenders of Wildlife*, 504 U.S. at 562.

Beyond that, the decision below could not conflict with ones involving "the federal government['s] exercis[e] of permitting or funding authority" (Pet. 24) for the simple reason that this case does not involve a federal permit or funding. Instead, the FAA approved an application to collect private funds for a project that received all necessary federal permits years ago in a separate FAA decision that the D.C. Circuit upheld in a separate case. Moreover, when petitioners challenged the permitting decision (the

ALP) under RFRA, the D.C. Circuit did not dismiss for lack of standing but it held that the RFRA claim failed on the merits. See Pet. App. 21a-40a. As a result, petitioners' claims that the D.C. Circuit will allow local governments "to avoid judicial enforcement of federal environmental laws altogether by merely claiming that they have alternative sources of funds" (Pet. 8) describes neither this case nor *Bensenville*. Nor does this case present any issue of segmented projects, of the type that may go under the radar of environmental regulation. See, *e.g.*, *O'Reilly v. U.S. Army Corps of Engineers*, 477 F.3d 225, 235-36 (5th Cir. 2007); *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 298-300 (D.C. Cir. 1987). That is because petitioners' concern about "piecemeal payment of the $337 million LOI" (Pet. 14) ignores both that the LOI is not in front of the Court in this case and that the D.C. Circuit considered it in its entirety and still rejected it as a basis for standing because invalidating it would not redress petitioners' claim of injury. Pet. App. 43a-44a; see *id.* at 63a-64a, 67a.

Petitioners should not be allowed to relitigate rulings made in other cases or even use them as "context." Pet. 5. "Context" means that the noteworthy issues were actually decided in other cases. For this reason alone, this case would be a poor candidate for review even if it did raise some generally significant question of federal standing or substantive law (which it does not). This case is laden with preclusion problems because "factual findings * * * essential to the review sought in this case" were made in "separate actions." *Id.* at 11. Perhaps petitioners forwent review of *Bensenville* because they had waived any argument how, under settled state-action cases and this Court's constitutional holding in

*Boerne*, the court could nonetheless hold the federal government responsible for Chicago's planned cemetery relocation. Or perhaps their litigation choices reveal no belief in the correctness of their position but only an intent to wage a multi-year, multi-jurisdictional litigation campaign against airport expansion. Whatever the reason, petitioners' claim of broad significance for decisions "[t]aken together" (*id.* at 23) is no basis to free them from the usual rules aimed at avoiding "the expense and vexation attending multiple lawsuits, conserv[ing] judicial resources, and foster[ing] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. 147, 153-54 (1979). With the prior *Bensenville* litigation having settled that the harm petitioners complain of is not fairly traceable to the FAA, but caused solely by Chicago, there is nothing untoward or out of step, much less dangerous, about a standing ruling that merely confirms petitioners cannot seek redress from the FAA.

These concerns have, if anything, added force in this case, given the Court's reliance in *Boerne*, in holding RFRA unconstitutional against state and local governments, on the costs of not only "curtailing [the States'] traditional general regulatory power" but also "in practical terms of imposing a heavy litigation burden." 521 U.S. at 534. Despite the constitutional infirmity in applying RFRA to Chicago, petitioners have attempted to do essentially that in five successive petitions for review in the D.C. Circuit.

And federalism concerns about the dignitary interests and litigation burdens on state and local governments are only part of what is at stake here. Petitioners have steadfastly ignored that the OMP

relieves significant pressures on the national aviation system and provides relief to millions of travelers, many of whom use O'Hare to fulfill work, family, and their own religious obligations. In exercising its discretionary jurisdiction, this Court need not and should not ignore that at some point litigation must come to an end and there are well-recognized grounds for "preclud[ing] parties from contesting matters that they have had a full and fair opportunity to litigate." *Montana*, 440 U.S. at 153. Nor should it grant certiorari to allow litigation of issues long since settled between the parties.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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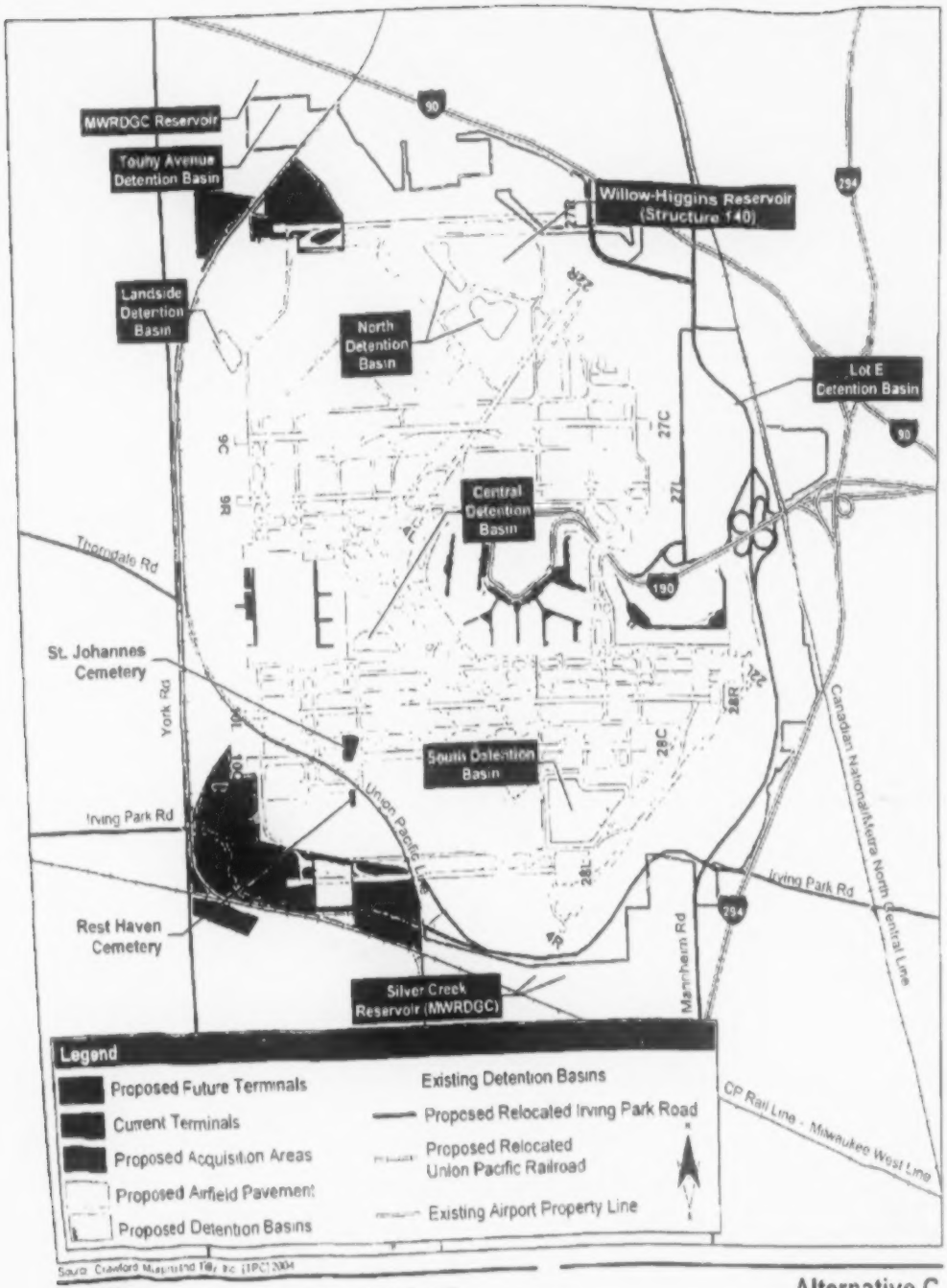
# APPENDIX




Source: Crawford Murphy and Tilly, Inc. (IPC) 2004

Chicago O'Hare International Airport

**Alternative C**

▶ **Exhibit 3-8**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September Term 2007
No. 07-1435
FAA-3017-0022-91

Filed On: July 14, 2008

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ST. JOHN'S UNITED CHURCH OF CHRIST, *et al.*,
*Petitioners*

v.

FEDERAL AVIATION ADMINISTRATION AND
ROBERT A. STURGELL, ACTING ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,
*Respondents*

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CITY OF CHICAGO,
*Intervenor*

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BEFORE: Ginsburg, Randolph, and Kavanaugh, *Circuit Judges*

ORDER

Upon consideration of the motion to dismiss, the opposition thereto, and the reply; the motion to hold case in abeyance, the opposition thereto, and the reply, it is

ORDERED that the motion to dismiss be granted. Petitioners lack standing, because they have not shown that the single $28.4 million grant is the cause of their injuries, or that those injuries are redressable. Like the previously challenged $29.3 million

grant, the $28.4 million grant "reimburses Chicago for completed work that did not affect the petitioners ...." *St. John's United Church of Christ v. FAA*, 520 F.3d 460, 462 (D.C. Cir. 2008). This court has already determined that "vacating the $337 million in the [FAA's Letter of Intent] would not redress petitioners' injuries because federal money plays a 'minor role' and Chicago could replace it with other sources of funding." *Id.* at 463; *see also Village of Bensenville v. FAA*, 457 F.3d 52, 70 (D.C. Cir. 2006). It is

FURTHER ORDERED that the motion to hold in abeyance be dismissed as moot.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September Term 2007
No. 07-1435

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Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam